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No. 02-1802

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH BERNARD NICHOLS,

Petitioner,

v.

THE STATE OF TEXAS

Respondent.

On Petition for Writ of Certiorari
To the Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the State suppressed exculpatory evidence.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Nichols is a Texas death-sentenced inmate seeking a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals denying and dismissing his state habeas corpus petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional provisions on which Nichols relies, this case also involves Article 11.071 of the Texas Code of Criminal Procedure. Section 5 of Article 11.071 provides, in relevant part, as follows:

> (a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:
>
> > (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
> >
> > (2) by a preponderance of the

> evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071 or 37.0711.

Tex. Code Crim. Proc. Ann. art. 11.071 § 5(a) (Vernon Supp. 2002).

STATEMENT OF THE CASE

Nichols was convicted of capital murder and sentenced to death on March 10, 1982, in cause number 323836 in the 178th District Court of Harris County, Texas. The Court of Criminal Appeals affirmed, and this Court denied his petition for writ of certiorari. *Nichols v. State*, 754 S.W.2d 185 (Tex. Crim. App. 1988), *cert. denied*, 488 U.S. 1019 (1989). Nichols then sought state habeas corpus relief. Following an evidentiary hearing, the trial court recommended that relief be denied, and on December 12, 1991, the Court of Criminal Appeals denied the writ. *Ex parte Nichols*, No. 21,253-01.

Nichols next ventured into federal court, where he succeeded in obtaining partial relief. *Nichols v. Collins*, 802 F. Supp. 66 (S.D. Tex. 1992). The State appealed; the United States Court of Appeals for the Fifth Circuit reversed, and this Court denied certiorari. *Nichols v. Scott*, 69 F.3d 1255 (5th Cir. 1995), *cert. denied sub nom. Nichols v. Johnson*, 518 U.S. 1022 (1996).

Nichols returned to state court and filed another state writ application. The trial court found that it was a successive petition and forwarded it to the Court of Criminal Appeals. The Texas high court agreed with the trial court's determination except as to Nichols's *Brady* claim and remanded for consideration of the merits of that allegation. Following a second evidentiary hearing, the trial court made findings of fact and conclusions of law and recommended that relief be denied. On

March 12, 2003, the Court of Criminal Appeals denied the writ based on the trial court's findings. *Ex parte Nichols*, No. 21,253-02.

STATEMENT OF THE FACTS

I. Facts of the Crime

About 9:00 a.m. on the morning of October 13, 1980, Nichols, Willie Ray Williams (Williams), Charlotte Parker (Parker), and Evelyn Harvey (Harvey) drove to a spot in front of an apartment building near Joseph's Delicatessen and Grocery in Houston, Texas. Nichols and Williams mutually intended to rob this establishment, Nichols having suggested it as a target. Williams was armed with a .380 semi-automatic pistol; Nichols had a snub-nosed .38 revolver. Parker parked the car and Nichols and Williams got out and entered the deli. After entering, Nichols and Williams first went to the back of the store, and then approached the counter. Nichols got a corndog. Williams set a quart of beer on the counter near the cash register. Behind the counter was deli employee Claude Shaffer, Jr. (Shaffer). Nichols, and then Williams, each drew their respective pistols and pointed them at Shaffer.

When Shaffer saw the guns he began to bend over or squat down. Nichols then said something to the effect of "don't go for the gun" or "don't be doing it." Nichols then shot at Shaffer, and immediately thereafter Williams pulled the trigger on his gun, but it is unclear whether it then discharged. Shaffer then either fell or squatted down behind the counter. Nichols and Williams ran to the door. Nichols exited. Williams either exited or partially exited and then, according to his testimony at Nichols' trial, turned and fired once at Shaffer, who was still squatting behind the counter. Williams testified that Shaffer fell back, that he (Williams) went behind the counter to Shaffer, turned him over, grabbed the deli's cash box, and ran

out of the deli, carrying his gun and the cash box. He was picked up by Parker and Harvey, got into the car with them, and they drove around the side of the deli building where they saw Nichols, who then got in the car with them. Harvey testified that Nichols told them "he had shot the man" and "he thought he shot him in the chest," and that Williams said he had run back into the deli and shot the man. Parker testified that Nichols said "I think I hit him in the chest," and that Williams said "he [Williams] shot the man in the shoulder." A few days later, Williams, Nichols, Parker, and Harvey were arrested.

The testimony of the Harris County Medical Examiner, Dr. Espinola, established without contradiction that Shaffer died from a single gunshot wound that entered his "left upper back about seven and three fourths [inches] to the left of the midline and three and one half inches below the top of the shoulder" and exited--without hitting any bones or "hard objects" within the body--"on the right side of the chest, 18 and one half inches from the right of the midline and 11 inches below the top of the shoulder." The wound would have caused "almost immediate disability" or "collapse." Shaffer also had a superficial two and a quarter inch slanting laceration on the right side of his head, which was "consistent with a grazing type of gunshot wound" and "could also be consistent with a person that hit their head on the corner of an object or anything like that in a fall." The head wound was not disabling. No bullet or bullet fragment was found in or on Shaffer's body. Two empty .380 cartridge cases--ejected from Williams' pistol--were found in the deli, as was also a whole .380 brass-jacketed projectile or bullet, which had been fired from Williams' weapon. A whole, unfired .380 brass-jacketed bullet and cartridge (with firing pin

> indentation on the cartridge rim) was found just outside the deli door. Lead bullet fragments were found on the inside of the deli door and near there on the floor along with brass jacket fragments. Also found in the deli--in a stack of comic books behind the counter--was a whole lead bullet that had been fired from a .38-caliber weapon. This was a revolver-type bullet that had never been jacketed.

Nichols v. Scott, 69 F.3d at 1259-60 (footnotes omitted).

> At the close of the evidence on the guilt/innocence stage of the trial, the trial court extensively instructed the jury on the Texas law of parties such that the jury could, depending on what else it found, find Nichols guilty as charged for either having fired the fatal shot or for the fatal shot fired by Williams, if that was done pursuant to and in furtherance of their conspiracy to rob the deli and should have been anticipated by Nichols as a result of carrying out the conspiracy. The defense argued, as it had at Nichols' first trial, that Williams fired the fatal shot from the deli door as he exited and came back in, and that this was, in the words of the charge, "the separate act of Willie Ray Williams acting independently," for which Nichols would not be responsible. The state primarily argued that Nichols fired the fatal shot. *But,* it also argued extensively, in the alternative, that even if Williams had fired the fatal shot, Nichols was guilty of capital murder under the law of parties.

Id. at 1262 (original emphasis, footnotes and parenthetical omitted).

II. Facts Relating to Punishment

At the subsequent punishment phase the state submitted evidence that Nichols had been convicted of

> theft in 1979, and had pleaded guilty in May 1980 to an April 1980 robbery for which he was sentenced in July 1980 to nine years' felony probation, which he was serving when he committed the instant offense. Additionally, it was shown that on August 15, 1980, Nichols committed an armed robbery of a convenience store, shooting the clerk in the shoulder when he did not respond speedily enough to Nichols' demand for more money. Nichols continued to demand more money as the clerk was bleeding from his wound. Further, on October 11, 1980, two days before the present offense, Nichols committed another robbery of a convenience store, aiming his pistol at the clerks. There was also evidence that when booked into jail following his arrest for the instant offense, Nichols had stated that he would "shoot any deputy that got in his way." Finally, there was evidence that in June 1981, while in jail awaiting trial, Nichols conspired with others to engage in an escape involving the use of a firearm and other weapons. The defense called fifteen witnesses. Many testified they thought Nichols could be rehabilitated, that he was nineteen at the time of the offense, and that at school he had had average grades, had been an excellent athlete, and had presented no disciplinary problems. His parents divorced when he was seven, but both maintained a good relationship with him. He married, and dropped out of school, at about age seventeen to support his young child. His parents thought he had gotten into trouble due to the pressure he was under to support his young child and because he got in with a bad crowd.

Id. at 1263.

III. Facts Relating to the Issues Presented

In addition to Nichols, Williams, and Shaffer, there were two

other persons present when the murder was committed – delicatessen employees Cindy Johnson and Teresa Henry, who later changed her name to Ishman when she married ("Ishman").

A. Cindy Johnson

On the day of the offense, Johnson gave the police a statement. Petitioner's Exhibit A. Therein, she averred, *inter alia*, that Shaffer was reaching for his gun when he was shot; that both robbers then shot him; and that after they departed, one of the robbers returned and fired another shot and grabbed the cash box.

Johnson testified at trial that she did not see Shaffer reaching for a gun when he was shot. The defense impeached her with her written statement; Johnson "admitted making the statement, but said that although Shaffer 'went down in a squat position,' she 'didn't see him reach for anything.'" *Nichols v. Scott*, 69 F.3d at 1287. In addition, Johnson also testified that when Nichols and Williams shot at Shaffer, Ishman "was back in the kitchen or bathroom and did not come out." *Id.* at 1286.

On April 9, 1992, Johnson executed an affidavit offering a version of events that was consistent with her original statement. Petitioner' Exhibit E. She averred that when Shaffer squatted down, "[i]t looked like he was going for his gun;" that Nichols shot first, and that Williams then fired the killing shot; and that she hid in the restroom after the first shots were fired and heard (but did not see) someone return and fire another shot.

B. Teresa Ishman

Immediately after the shooting, Ishman "was uncooperative, claimed not to have seen anything, was fired by the owner, and left the scene before the first officer arrived on the scene . . . ." Petitioner's Appendix. 72, 88.

On April 12, 1992, Ishman executed an affidavit describing her

observations of the events that led to Shaffer's death. Respondent's Appendix.[1] She averred that she saw Nichols and Williams enter the store and that she recognized Nichols because she "had seen him before." App. 1. She saw Shaffer reach for his gun, and Williams said "something like, 'don't go for the gun!'" Immediately afterward, "shots started firing. I turned and ran towards the back of the store." App. 2.

C. Materiality

Nichols did not raise a *Brady* claim on federal habeas review, but did allege ineffective assistance of counsel, based on the Johnson and Ishman affidavits, for not adequately interviewing these witnesses. *Nichols v. Scott,* 69 F.3d at 1286. In rejecting this allegation, the Fifth Circuit noted that

> the Ishman affidavit states that she initially told the police that she saw nothing. This was consistent with Johnson's testimony that when Nichols and Williams shot at Shaffer, the other deli employee there–Ishman (then known as McGee, which was not her true name)–was back in the kitchen or bathroom and did not come out. As to Johnson, defense counsel had already reviewed–and at trial succeeded in getting before the jury–her written, sworn statement to the police, and there was nothing to indicate that she had ever said anything else, much less anything favorable to the defense. Nor do the April 1992 affidavits show a probability of a different result sufficient to undermine confidence in the outcome. Johnson's affidavit reflects that just after Nichols shot, and *before* either Nichols or Williams left, she saw Williams "leaning across the counter and firing the shot that killed Mr. Shaeffer (sic)." This entirely contradicts the defense theory that

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[1] It is interesting that while Nichols relies heavily on Ishman's affidavit, he did not include it in the lengthy appendix to the petition for writ of certiorari.

> the fatal shot was fired by Williams from the door after Nichols left and thus was "the separate act of" Williams "acting independently" for which under the charge Nichols would not be responsible. Ishman's affidavit mentions only an initial set of shots fired from the counter area (after which she ran into the restroom, where Johnson "was already locked in"). Ishman does state Shaffer "went down and reached under the counter for his gun," but this is just what Johnson's October 13, 1980 statement–which was before the jury without limitation–said. In Johnson's trial testimony, she admitted making the October 13, 1980, statement, but said that although Shaffer "went down in a squat position," she "didn't see him reach for anything." Nichols' statement and Williams' testimony, both before the jury, were that Shaffer came up with a gun in his hand.

Id. at 1286-87 (original emphasis, footnotes omitted).

After the Court of Criminal Appeals remanded for merits review of Nichols's *Brady* claim, the trial court found that the evidence was not material and, alternatively, that Nichols did not exercise due diligence in attempting to locate Ishman. Petitioner's App. 104-05.[2] Specifically, the court found that Nichols "fails to show the materiality

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[2] Nichols misrepresents the record in asserting that the state habeas court found that "Ishman's testimony is material." Petition at 12 (citing Petitioner's App. 61, finding 8(C)). The finding to which he refers is as follows: "Evidence that corroborates a defendant's version of the facts is material and favorable: 'Logic dictates that evidence from a disinterested witness corroborative of the defendant's version of events would be favorable to the defendant.' *Flores v. State*, 940 S.W.2d at 192." In fact, as discussed throughout this brief, the state courts expressly rejected Nichols's *Brady* claim for lack of materiality.

In addition, Nichols's Appendix C is misdated and incomplete. It contains only forty-six of the fifty-four fact findings made by the state habeas court. It also states that it was filed on May 13, 1998, when in fact it was signed on April 9, 2001.

of any undisclosed information" and "fails to show that any undisclosed information . . . is material in light of the entire record." The Court of Criminal Appeals denied relief based on the trial court's findings and conclusions, in particular the finding that Nichols had not met the materiality prong of *Brady*. Petitioner's App. 2.

ARGUMENT

I. The Question Presented for Review Are Unworthy of the Court's Attention.

Rule 10 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are truly compelling reasons therefor. Nichols advances no compelling reason in this case, and none exists. Further, the issues in this case involve only the application of established constitutional principles to the facts, *i.e.*, whether the state courts correctly found that the State did not suppress exculpatory evidence. Thus, the petition presents no important question of law to justify this Court's exercise of its certiorari jurisdiction.

In addition, because there is no constitutional right to state habeas corpus proceedings, it follows that the denial of state habeas relief does not present a federal question for certiorari review:

> A post-conviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment. Nothing in the Constitution requires the States to provide such proceedings . . . nor does it seem to me that the Constitution requires the States to follow any particular federal model in those proceedings.

Murray v. Giarratano, 492 U.S. 1, 13 (1989) (O'Connor, J., concurring). Similarly, certiorari review of state habeas decisions is even more inappropriate where, as here, a claim is ripe for federal habeas review. This is because

> this Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims. Instead, the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims.

Kyles v. Whitley, 498 U.S. 931, 932 (1990) (Stevens, J., concurring).

Justice Stevens's observation is particularly relevant to this case, as on July 10, 2003, Nichols filed an amended petition in his previously dismissed federal habeas action raising the claims presented in his petition for writ of certiorari. *Nichols v. Cockrell,* No. 4:92cv00036. Given the pendency of that action, review should be denied to allow for consideration of his allegations in the "more appropriate" arena of federal habeas corpus.

II. Nichols's Allegation of Perjured Testimony Is Not Properly Before the Court.

The first and third questions presented in Nichols's petition for writ of certiorari involve, respectively, the materiality and suppression prongs of a claim that the State suppressed exculpatory evidence in violation of *Brady v. Maryland,* 373 U.S. 83 (1963). The second question concerns whether the State presented false testimony. Nichols is not entitled to review of this issue, however, because it was not raised in the court below. Even had Nichols presented this claim to the state courts, certiorari review nonetheless would be inappropriate, as all of Nichols's allegations other than his *Brady* claim were rejected on the basis of an adequate, independent state-law ground.

A. Claim not raised below

In the habeas petition the denial of which Nichols seeks review of in this Court, he raised four claims for relief: (1) suppression of exculpatory evidence, (2) unfairness in the State pursuing alternative

theories against Nichols and his co-defendant, (3) cumulative error, and (4) collateral estoppel. *Ex parte Nichols* at 17, 20, 27, 34. He made no allegation that the State presented false testimony. The cases are legion that this Court will not consider an issue that was not raised in the courts below. *E.g., McCleskey v. Zant*, 499 U.S. 467, 522 n.10 (1991); *United States v. Montoya de Hernandez*, 473 U.S. 531, 540 n.4 (1985). Because Nichols's claim of perjured testimony is presented for the first time in this Court, it is not an issue on which certiorari review should be granted.

B. Successive state habeas corpus petition

Moreover, even if Nichols's state habeas claims could somehow be construed as including an allegation of perjured testimony–which they plainly cannot–review nonetheless should be denied because the state courts dismissed all of his allegations except his *Brady* claim as an abuse of the writ. When Nichols filed his petition, the state trial court entered an order finding that it was successive. *Ex parte Nichols* at 96. In orders entered on April 16 and 30, 1997, the Court of Criminal Appeals for the most part agreed, finding that only the *Brady* claim was entitled to merits review and remanding for an evidentiary hearing limited to that issue. Petitioner's Appendix B. The effect of these orders was to dismiss the remaining claims as an abuse of the writ.

It is well settled that "this Court 'will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.'" *Lambrix v. Singletary*, 520 U.S. 518, 522-23 (1997) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)); *see also Harris v. Reed*, 489 U.S. 255, 262 (1989) (an adequate and independent state procedural default will bar federal habeas review of a claim absent a showing of cause and prejudice). This is so because the Court "in fact lack[s] jurisdiction to review such independently supported judgments on direct appeal: Since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory." *Lambrix*, 520 U.S. at 523 (citing *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945)); *see also Sochor*

v. Florida, 504 U.S. 527, 533 (1992) (noting and applying rule that "this Court lacks jurisdiction to review a state court's resolution of an issue of federal law if the state court's decision rests on an adequate and independent state ground"); *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) ("If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision").

The Texas Court of Criminal Appeals refused to review Nichols's claims on the basis of Section 5(a) of Article 11.071 of the Texas Code of Criminal Procedure, which forbids consideration of successive habeas petitions raising allegations for which the legal and factual bases previously were available. *See Moore v. Texas,* 535 U.S. 1110 (2002) (Scalia, J., dissenting). "There is no question that this procedural bar is an adequate state ground; it is firmly established and has been regularly followed by Texas courts since at least 1994." *Id.* (citing *Barrientes v. Johnson,* 221 F.3d 741, 758-59 (5th Cir. 2000)). *See also Fuller v. Johnson*, 158 F.3d 903, 906 (5th Cir. 1998); *Emery v. Johnson*, 139 F.3d 191, 195-96 (5th Cir. 1997). *A fortiori.* the Texas court's application of this rule to bar consideration of Nichols's claims likewise forecloses certiorari review by this Court.

III. The State Did Not Suppress Exculpatory Evidence.

In *Brady v. Maryland,* the Court held that "the suppression by the prosecution of evidence favorable to an accused after a request violates due process where the evidence is material either to guilt or punishment, irrespective of the good or bad faith of the prosecution." 373 U.S. at 87.

> The *Brady* rule is based on the requirement of due process. Its purpose is not to replace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to

> disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial.

United States v. Bagley, 473 U.S. 667, 675 (1985). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. at 434.

Nichols alleges that the State suppressed (1) knowledge of Cindy Johnson's change in testimony as to whether Shaffer was reaching for a gun when he was shot, and (2) Ishman's whereabouts and her testimony impeaching Johnson. Petition at 18-22. As noted above, the state courts found that the evidence was not material and, alternatively, that Nichols did not exercise due diligence in attempting to locate Ishman. While Nichols challenges both holdings, it is not necessary to consider the latter issue, as his *Brady* claim plainly fails for lack of materiality. *E.g., Patterson v. Shumate*, 504 U.S. 753, 764 (1992) (generally, Court need not reach alternate ground when unnecessary to its disposition of the case); *Odem v. Hopkins*, 192 F.3d 772, 777 (8th Cir. 1999) (where one of *Brady* requirements is not satisfied, court need not address other *Brady* prongs).

Illuminating on the issue of materiality is *Strickler v. Greene*, 527 U.S. 263 (1999),[3] a capital case in which the only eyewitness to the victim's abduction was a woman named Anne Stoltzfus, who identified Strickler as being the ringleader of the perpetrators. At trial, she testified, *inter alia*, that she had "an exceptionally good memory" and had "absolutely no doubt of my identification." *Id.* at 272. After trial, it was discovered that the prosecution had failed to disclose documents that "cast serious doubt on Stoltzfus' confident assertion of her 'exceptionally good memory.'" *Id.* at 273. The Court nonetheless rejected Strickler's *Brady* claim for lack of materiality, noting that

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[3] Although *Strickler* considered materiality in the context of a "cause-and-prejudice" procedural default analysis, the standard is the same for the materiality prong of a substantive *Brady* claim. *Strickler*, 527 U.S. at 282.

"[e]ven if Stoltzfus and her testimony had been entirely discredited, the jury might still have" convicted him of capital murder and assessed a death sentence due to the strong case presented by the State. *Id.* at 292. "Notwithstanding the obvious significance of Stoltzfus' testimony, petitioner has not convinced us there is a reasonable probability that the jury would have returned a different verdict if her testimony had been either severely impeached or excluded entirely." *Id.* at 296.

Nichols fails to show materiality, for several reasons. As discussed above, the Fifth Circuit already has found, as a matter of law, that Johnson's and Ishman's affidavits are not material, *Nichols v. Scott,* 69 F.3d at 1286-87, a fact noted by the state habeas court in reaching the same conclusion. *Ex parte Nichols* at 44. These holdings are surely correct, as the allegedly suppressed evidence of which Nichols complains is of much less import than that in *Strickler* and falls far short of discrediting the State's case against him.

A. Guilt-innocence

Nichols attaches far too much significance to Ishman's averment that Shaffer was reaching for a gun when he was shot. "[T]his is just what Johnson's October 13, 1980, statement--which was before the jury without limitation–said." *Nichols v. Scott,* 69 F.3d at 1287. Thus, whether Shaffer was reaching for a gun was a contested issue that the defense was able to press even without the benefit of Ishman's testimony. *See United States v. Moreno-Morales,* 2003 WL 21512239 *7 (1st Cir. 2003) (materiality not shown where "new evidence . . . largely matches an account given soon after the incident (an account that was disclosed to the defense)"). Where, as here, impeachment evidence is merely cumulative of other evidence that was available to the defense, it is not material. *Knighton v. Mullin,* 293 F.3d 1165, 1177 (10th Cir 2002); *United States v. Thompson,* 286 F.3d 950, 967 n.9 (7th Cir. 2002); *Spence v. Johnson,* 80 F.3d 989, 995 (5th Cir. 1996).

Moreover, assuming *arguendo* that Shaffer was reaching for a gun, establishing that fact would not have aided the defense case on guilt-innocence. As the state habeas court found, under Texas law, "a

robber has no right to self-defense." Petitioner's App. 81 (citing *Davis v. State*, 597 S.W.2d 388 (Tex. Crim. App. 1980)).

Similarly, Johnson's statement not only was unhelpful to Nichols's defense, it in fact was extremely prejudicial.

> Johnson's affidavit reflects that just after Nichols shot, and *before* either Nichols or Williams left, she saw Williams "leaning across the counter and firing the shot that killed Mr. Shaeffer (sic)." This entirely contradicts the defense theory that the fatal shot was fired by Williams from the door after Nichols left and thus was "the separate act of" Williams "acting independently" for which under the charge Nichols would not be responsible.

Nichols v. Scott, 69 F.3d at 1287 (original emphasis).

Revealing of the tenuousness of Nichols's position is his contention that Ishman's statement impeached Johnson's testimony by showing that she could not have seen the shooting "because Johnson was locked in the bathroom." Petition at 22. While he relies on Johnson's testimony to establish that he did not fire the fatal shot, he makes the contradictory argument that Ishman's version of events proves that Johnson could not have seen anything.

Moreover, Ishman's affidavit shows that she herself did not see the shooting: "Right after [Williams said, 'don't go for the gun'], shots started firing. I turned and ran towards the back of the store." Respondent's App. 2. Likewise, Johnson averred that when Shaffer was shot, Ishman "was back in the kitchen or bathroom and did not come out." *Nichols v. Scott*, 69 F.3d at 1286. In short, Ishman says she saw the shooting and Johnson did not, and Johnson says just the opposite. Thus, Ishman's version of events was hardly devastating to the State's case. Moreover, it suffered at the state evidentiary hearing, as the state habeas court found that her testimony was seriously impeached. Petitioner's App. 76-77, 80-81, 103-04.

Even accepting Nichols's submission that Ishman could have established doubt about whose shot killed Shaffer, it would have availed Nichols nothing, because the jury was instructed on the Texas law of parties pursuant to which Nichols could be held criminally responsible for Williams's acts, as the state habeas court found. Petitioner's App. 80-81; *see Nichols v. Scott*, 69 F.3d at 1263. While "[t]he state argued primarily that Nichols fired the fatal shot[,] . . . . it also argued extensively, in the alternative, that even if Williams had fired the fatal shot, Nichols was guilty of capital murder under the law of parties." *Id.* Thus, Nichols's "guilt of capital murder did not depend on proof that he was the [shooter] . . . ." *Strickler*, 527 U.S. at 292. Regardless whose shot killed Shaffer, proof that Nichols aided and assisted in the offense "was sufficient under the judge's instructions." *Id.*

B. Punishment

Nor can Nichols show materiality with regard to the punishment phase of trial. As discussed above, in addition to the murder of Shaffer, the State offered evidence that Nichols was involved in a string of robberies, including another one in which he shot the clerk. In addition, he made death threats while in jail awaiting trial and also helped plan an escape that was to involve the use of firearms and other weapons. Thus, the jury was provided with ample evidence of his capacity for continued violence, including a robbery in which he undoubtedly was the shooter. On this record, the state habeas court quite reasonably found "that Ishman's 1992 affidavit and 1997 writ hearing testimony does not support a negative answer to the third special issue as to whether [Nichols's] conduct in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." Petitioner's App. 82.

CONCLUSION

For the foregoing reasons, the State respectfully requests that Nichols's petition for writ of certiorari be denied.

Respectfully submitted,

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